

No. 11288.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MIKE RADICH and C. T. BROWN, etc.,

Appellants,

vs.

UNITED STATES OF AMERICA, etc., *et al.*,

Appellees.

APPELLEE'S BRIEF.

JAMES M. CARTER,
United States Attorney,

RONALD WALKER and
CAMERON L. LILLIE,
Assistant U. S. Attorneys,

600 U. S. Postoffice and Courthouse Building,
Los Angeles 12, California,

Attorneys for Appellees.

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APPELLEE'S BRIEF.

Jurisdictional Statement.

This action was brought in the District Court of the United States for the Southern District of California, pursuant to the provisions of Section 24 of the Judicial Code, Title 28, U. S. C., Section 41(1)(2). Judgment was entered therein December 21, 1945 [R. 119]. Notice of Appeal was filed on January 25, 1946 [R. 125]. The United States Circuit Court of Appeals for the Ninth Circuit has jurisdiction under Section 28 of the Judicial Code (Title 28, U. S. C., Section 225).

Statement of Case.

The plaintiff, C. B. Stratton, filed his Complaint [R. 2] in the District Court of the United States for the Southern District of California, Central Division, naming the United States of America defendant, alleging that the

United States of America owed him for construction work under a contract in connection with the Palm Springs Army Airfield the sum of four thousand six hundred forty-five dollars and thirty-five cents (\$4,645.35). The defendant, United States of America, filed its Answer and Counterclaim and Cross-claim naming new parties as cross-defendants [R.* 5-6], which was later amended [19]. The Amended Counterclaim and Cross-claim alleged, in substance, that the plaintiff, C. B. Stratton, and defendant, United States of America, entered into a contract, the plaintiff to undertake certain construction work. In connection with this contract the plaintiff and cross-defendant C. B. Stratton entered into a contract with the cross-defendant Jack Wilcox, for paving and grading work, and further entered into a contract with the cross-defendant Walter S. Roeder for the laying of water mains.

The Counter-claim and Cross-claim alleges further that the appellants, the cross-defendants, Mike Radich and C. T. Brown, owned a tractor; that the tractor with an operator, Clarence Davis, another cross-defendant, was rented to cross-defendant Galen B. Finch; that thereafter cross-defendant Galen B. Finch rented the tractor with the operator to cross-defendants Mel Meyers and Otto Davis; that thereafter the tractor and operator were rented to cross-defendant Jack Wilcox; that Jack Wilcox rented the tractor with the operator to cross-defendant Walter S. Roeder for the purpose of leveling some land on the Palm Springs Army Airfield; that on May 2, 1944, the tractor, under the operation of cross-defendant

*Hereafter the numbers in parentheses will refer to the corresponding pages of the transcript of record.

Clarence Davis, while doing leveling work on the air-field, backed into a United States airplane parked thereon, doing damage to it in the amount of four thousand six hundred forty-five dollars and thirty-five cents (\$4,645.35).

To the cross-claim the present appellants interposed an Answer [17] denying that the operator of the tractor was acting as their employee and servant at the time of the accident in which the United States airplane was damaged, and denied further that he was acting at the time in the scope of his employment.

The remaining cross-defendants filed similar Answers, setting up their denials which are not pertinent to the question presented here.

The cause was tried on the 19th day of November, 1945, before the Honorable Ben Harrison, Judge of the United States District Court for the Southern District of California, Central Division, Los Angeles, California, without a jury, the jury having been waived [119].

Judgment was entered December 21, 1945, in favor of the plaintiff and cross-defendant C. B. Stratton and against the United States of America for the amount sued for, four thousand six hundred forty-five dollars and thirty-five cents (\$4,645.35), and judgment was entered in favor of the United States of America against the cross-defendants Mike Radich and C. T. Brown, the appellants, for the sum of four thousand six hundred forty-five dollars and thirty-five cents (\$4,645.35), for damages to the airplane owned by the United States Government, and for costs [119]. It is from this latter judgment that the appellants appeal.

Statement of Facts.

The record will disclose the following material evidence adduced at the time of the trial:

That on May 2, 1944, Clarence Davis, the operator of a tractor, while doing land-leveling work on the Palm Springs Army Airfield, California, for Walter S. Roeder, one of the subcontractors of C. B. Stratton, backed into a parked United States Army airplane. Government Exhibit "A" [94];

That it was stipulated between all counsel at the time of the trial that the reasonable value of the damage to the plane was the sum of four thousand six hundred forty-five dollars and thirty-five cents (\$4,645.35), the exact amount withheld by the United States Government under the original contract with C. B. Stratton [134]. It was further stipulated that the tractor involved in the accident was owned by the appellants and that the cross-defendant Clarence Davis was operating the tractor at the time of the accident [132].

That the appellants entered into an agreement with Galen B. Finch whereby the tractor was to be used in land leveling [166, 190 and 257], fully operated [176-177], and maintained [175 and 182]; that at the time equipment was delivered to Galen B. Finch the operator, Clarence Davis, was given no special instructions [177], but was instructed to take orders from Galen B. Finch [176-177 and 190]. No instructions were given the operator of the tractor, Clarence Davis, by the appellant prohibiting him from working with the tractor on any other job [174 and 176];

The Galen B. Finch leased the equipment with the operator, Clarence Davis, to Mel Meyers and Otto

Davis [212, 244-247]; Mel Meyers and Otto Davis leased the equipment with the operator, Clarence Davis, to Wilcox Construction Company [195 and 245]; and Wilcox Construction Company leased the equipment with the operator, Clarence Davis, to W. S. Roeder [193]. The accident occurred while under lease to W. S. Roeder;

That the appellants were engaged in the business of renting equipment [164], and that Clarence Davis at the time of the accident had been employed by appellants as the operator of the tractor and his wages at all times were paid by appellants [166-167, 174 and 258];

That appellants required certain qualifications and experience before they permitted any man to operate their equipment [174, 184 and 272], and the operator must be capable of effecting field repairs to equipment [167];

That no one other than appellants had the right to discharge Clarence Davis, the operator [177, 186 and 272]:

That Clarence Davis, the operator, handled the tractor at all times and at the time of the accident [132 and 258]. Government Exhibit "A" [94];

That the appellants supplied the gas, oil, and repairs necessary and the equipment was rented fully maintained by them [175 and 182];

That their operator was required to make out weekly reports as to the hours worked and the location of work done [175];

That the complete maintenance and operation by appellants was for the protection of the equipment and for the purpose of permitting them to retain possession of the equipment [191 and 272];

That Clarence Davis, the operator, was never the agent of the lessees. The lessees had only the right to tell him where and what work was to be accomplished [183-184, 256-257, 261 and 264].

ARGUMENT.

I.

The Appellants, General Employers of Clarence Davis, the Operator of the Tractor, Were Liable for His Negligent Acts in the Operation of the Tractor, Having Retained the Power of Control of Their Servant.

All counsel seem to agree upon the general rule of law that when a master hires out, under a rental agreement, the services of an employee for the operation of an instrumentality owned by the master, together with the instrumentality, without relinquishing to the hirer the power to discharge such servant, to go where and perform such work as the hirer directs, the presumption is that, although the hirer directs the servant where to go and what to do in the performance of the work, the servant, as the operator of the instrumentality employed in the doing of the work, remains, in the absence of an agreement to the contrary, the servant of the general employer in so far as concerns the manner and method of operating the instrumentality, and the negligence of the servant is the negligence of the owner of the instrumentality.

Our contention therefore is, in view of the evidence that the appellants owned the tractor, hired and paid for the operator whom no one but they had the right to control or direct, and that at the time of the accident the said Clarence Davis, operator, was in actual control of the tractor, no one suggesting, or having the right to suggest, other than the appellant, Mike Radich and C. T. Brown, how Clarence Davis operated or controlled the tractor;—that as a matter of law Clarence

Davis, the operator, was the employee of the appellants, Mike Radich and C. T. Brown, in operating the tractor.

We accept the general rule laid down by appellants citing 16 Cal. Jur. 1108, above set out, which we agree to be the law, but disagree with the statements of appellants that it appears from the evidence without dispute that the operator could have been discharged by the lessees. To the contrary, it appears that if the operator had not given the lessee a satisfactory day's work the lessee could have requested another operator from appellants [177, 186 and 272]. In this event the operator who was to be replaced would not leave the equipment until the second operator arrived; then Mike Radich and C. T. Brown, appellants, could discharge the first operator or continue him on the payroll and send him to another job—so that the power to discharge was in the hands of Mike Radich and C. T. Brown, the appellants, at all times.

It is without question well established by the cases that the application of law is determined by the facts in each case. Counsel for appellants, in citing a portion of the opinion in *Billig v. Southern Pacific Co.*, 189 Cal. 477, 298 Pac. 241, attempts to bring the facts in the instant case within a portion of the learned Court's opinion. Further reading of the opinion, on page 485, sets up the rule of law applicable:

“* * * When a master hires out under a rental agreement the services of an employee for the operation of an instrumentality owned by the master, together with the use of the instrumentality, without relinquishing to the hirer *the power to discharge such servant, to go where and perform such work as the hirer directs, the legal presumption is that, although the hirer directs the servant where to go and what*

to do in the performance of the work, the servant, as the operator of the instrumentality employed in the doing of the work, remains, in the absence of an agreement to the contrary, the servant of the general employer in so far as concerns the manner and method of operating the instrumentality, and the negligence of the servant must be held to be that of the owner and not that of the hirer of the instrumentality.” (Citing cases.) (Italics ours.)

The paramount right of control is in the appellants. It was at their direction that the operator made himself useful to the special employer; at no time did they resign full control. Their failure to exercise it does not affect the situation. The hirer described the work to be done, appellants prescribed how it was to be done. These principles are fully recognized in the case of *Peters v. United Studios, Inc.*, 98 Cal. App. 373, 277 Pac. 156, and other cases which analyze the question in terms of “Whom was the operator bound to obey?” and not “Whom he was obeying.” The purport of *Peters v. United Studios, Inc.*, *supra*, was not as the appellants in their brief, page 20, indicated, but rather that it could *not* be said as a matter of law either that the general employer was relieved of liability or that it remained liable.

The case of *Stewart v. California Improvement Company*, 131 Cal. 125, parallels the facts of this case. The defendant, California Improvement Company, had leased to the city of Oakland a steam roller, together with engineer and fuel for the engine, at a stated price per day. The street superintendent testified that the roller while operating on the street was entirely under the direction of himself or his foreman, and that they controlled its

operation to the extent involving what part of the street they wanted rolled, and exercised their own judgment as to when the street was rolled enough and when not. A judgment against the company was rendered in favor of the plaintiff, and this involved whether or not the city of Oakland was liable for negligence of the engineer blowing off steam and frightening a horse. The Supreme Court affirmed the judgment and, in doing so said:

“The company was to furnish the roller and engineer and fuel for so much a day, and the superintendent of streets was to control the movements of the roller by directing as to what portion of the street should be rolled, and when sufficiently rolled. Neither the superintendent of streets nor his foreman presumed to direct the engineer in reference to the management of the engine in regard to the pressure of the steam or how and when it should be applied or shut off, or in reference to escaping of steam through the safety valve. No one not an engineer or one having some knowledge or experience in reference to the management of an engine would assume to direct the engineer with reference to such matters. As he was the one to know, and not the superintendent of streets or his foreman, whether there was danger in the escape of steam through the safety valve, the duty revolved upon him to give people warning in case there was such danger; and for injury resulting from negligence in this respect he and the owner of the engine who put him in charge of the same would be responsible.

One who should hire a hack and driver from a carriage company, and in the use thereof should direct on what street to drive, where to go and when to stop, and in fact have the entire control of the movements of the carriage, would not thereby become

liable for damages resulting from the negligence of the driver in the management of his team; the driver is hired by the carriage company presumably for his fitness in the line for which he is employed—the same as was the engineer in this case by the California Improvement Company. If damages accrue through his negligence or carelessness, such company is liable, and not the one who may have hired or used the carriage.”

The Court in the same case further quoted from the case of *Boswell v. Laird*, 8 Cal. 469, as follows:

“The relationship between the parties to which responsibility attaches to one for the acts or negligence of the other must be of superior and subordinate, or, as it is generally expressed, of master and servant, in which the latter is subject to the control of the former. The responsibility is placed where the power exists. Having power to control, the superior or master is bound to exercise it to the prevention of injuries to third parties, or he will be held liable. The responsibility attaches to the superior upon the principle *Qui facit per alium facit per se*. To determine the responsibility, therefore, it is necessary to ascertain whether the relation existing between the party charged and the party actually committing the injury be in fact that of superior and subordinate, or master and servant.”

This case was referred to in *Du Pratt v. Lick*, 38 Cal. 691, as laying down the correct rule on this subject. The court there said:

“That where there is no power or selection or direction there can be no superior; and that where a man is employed to do the work with his own means and by his own servants, he has the power of selec-

tion and direction, and he, and in the person by whom the work is primarily done, is the superior.”

In referring to the doctrine as laid down by *Boswell v. Laird*, *supra*, the court said:

“We are entirely satisfied with it and find no occasion to renew the discussion.”

Further quoting the *Stewart* case in which it was clearly set forth which one becomes the agent or another:

“The test in all these cases is, Who conducts and supervises the particular work, the doing of which, or the careless and negligent doing of which, causes the injury or damage? Here the city hired the use of the steam roller outfit from the defendant company—to-wit, the roller, engine, and the engineer to manage the same—for so much a day. The city’s agent—foreman of the street superintendent—only directed or supervised how and where the street should be rolled. He did not have the control or management of the engine; this was subject entirely to the judgment of the engineer, the servant of the owner, the defendant company, who had selected and employed him for that special purpose, paid him his wages and had the sole right to discharge him. We think the conclusions of law deduced by the court below from the facts found that the defendant are liable, and not the city of Oakland is correct.”

In line with the above cases we cite the following:

McComas v. Al G. Barnes Shows Co., et al., 215 Cal. 685, 12 P. (2d) 630;

Schrimsher, et al. v. Reliance Rock Co., 116 Cal. App. 500, 2 P. (2d) 862;

Carlson v. Sunmaid Raisin Growers Ass’n, et al., 121 Cal. App. 719, 9 P. (2d) 546;

Madsen v. LeClair, 125 Cal. App. 393, 13 P. (2d) 939;

Lowell v. Harris, 24 Cal. App. (2d) 70, 74 P. (2d) 551;

Teller v. Bay and River Dredging Company, 151 Cal. 209;

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Charles v. Barrett, 233 N. Y. 125, 135 N. E. 199;

Bartolomeo v. Charles Bennett Contracting Co., 245 N. Y. 66, 156 N. E. 99.

There is no question but that Clarence Davis, the operator for the appellants, falls into the classification of the engineer in the case of *Stewart v. California Improvement Company*, *supra*, having control and management of the tractor. The lessees, analogous to the street superintendent, could only direct or supervise how and where the land leveling should be done. The lessees did not have the control or management of the tractor; this was subject entirely to the judgment of Clarence Davis, the operator, the servant of the owners, the appellants, who had selected and employed him for the special purpose and to retain to themselves possession of the tractor, paid him his wages, and had the sole right to discharge him.

The appellants set forth another rule of law, on page 26 of their brief:

“If a hired motor vehicle is used for the purpose different from that stipulated in the contract of hiring, the driver is not the agent of the owner in using it at the direction of the hirer, but becomes the employer responsible.”

And to sustain this rule they quote *Blue Bar Taxi Co. v. Hudspeth*, 25 Ariz. 287, 216 Pac. 246; *Fritz v. Hochspier Co.*, 287 Ill. 574, 123 N. E. 51. The cases in support of the rule above cited discuss the application of law on the theory of bailments.

It is fundamental that in order to find a bailment there must be necessarily a transfer of possession from the bailor to the bailee of the article involved in the bailment. The officer manager of the appellants, Edwin Ferguson, testified that at no time did the appellants transfer the actual possession of that machine to any other person than the appellants' employee, Clarence Davis, the operator [191].

It is obvious, therefore, that no bailment can be found under the particular facts and the rule of law above laid down does not apply and the cases cited are not pertinent to the problem at hand.

Assuming, but not conceding, for the sake of argument, that there could be a bailment in each lease of the equipment, the equipment was never used by the lessee for the purpose different from that agreed to in the original contract of hire. Edwin Ferguson further testified that the equipment was originally leased for land leveling [166 and 190]; at the time of the accident, while working at the Palm Springs Army Airfield, it was for this purpose that the tractor was used—leveling land [141-142]. Government Exhibit "A" [94]. Therefore, at no time was the instrument used for a purpose different from that originally agreed to in the contract of hiring, as indicated by Radich and Brown Exhibit "E" [105].

II.

**As to the Time, Place and Type of Work, There Was
No Departure From the Scope of the Operator's
Employment.**

To counsel's second point we can only refer the Court to the facts testified to at the time of the trial to indicate that at no time was there a departure from the master's employment as to time, place and type of work. No particular instructions were given to Clarence Davis, the operator, before he was sent down to work for cross-defendant Galen B. Finch, except that he was to work under the direction of cross-defendant Galen B. Finch in land-leveling work [176-177]. The operator, Clarence Davis, admittedly did not disregard instructions given by the appellants at any time [190]. Cross-defendant Galen B. Finch had instructed Clarence Davis, the operator, to perform other work than upon agricultural land prior to the work done on the Palm Springs Army Airfield job [221-222], although all work that was done under cross-defendant Galen B. Finch's direction, including the airfield work, was land leveling. The operator, Clarence Davis, testified that when he first arrived with the tractor near Palm Springs he understood that he was to take orders from Galen B. Finch, who when he met Clarence Davis, the operator, informed him, "There is a man down the road, Mr. Otto Davis, who will tell us where to go and what to do." From that time on the operator, Clarence Davis, took orders from Otto Davis, one of the partners of Davis and Meyers [253]. It is

apparent, therefore, from the record itself that the appellants had informed their employee, the operator, Clarence Davis, that he was to take directions from cross-defendant Galen B. Finch when he arrived with the tractor. There was no limitation given the operator, Clarence Davis, prohibiting operations on any job [174]. Cross-defendant Galen B. Finch then told the operator, Clarence Davis, that he was to take his orders from the cross-defendant Otto Davis, who had the tractor, with the operator, proceed to the Palm Springs Army Airfield to work for cross-defendant Jack Wilcox. Thereafter cross-defendant Jack Wilcox rented the tractor with the operator to cross-defendant Walter S. Roeder for whom the tractor and operator, Clarence Davis, were working at the time the United States Army airplane was damaged.

We contend, therefore, that under the facts there was no deviation or departure from the scope of operator's employment and that the negligence of the operator was the negligence of his employers, the appellants, Mike Radich and C. T. Brown.

Conclusion.

It is respectfully submitted that the facts sustain the relationship of employer and employee as between the appellants who owned the tractor and their operator Clarence Davis; and that as such general employers the appellants are liable for the negligence of their servant, the operator of the tractor;

That there was no deviation in time, place, or type of work which would indicate that there was a departure in scope of employment by the operator, Clarence Davis; and that at all times he was the servant of the general employers, the appellants, Mike Radich and C. T. Brown.

It is respectfully submitted that the judgment should be sustained.

Respectfully submitted,

JAMES M. CARTER,
United States Attorney,

RONALD WALKER and
CAMERON L. LILLIE,
Assistant U. S. Attorneys,
Attorneys for Appellees.